IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1171 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DIPIKABEN R PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR PH PATHAK for Petitioner

Mr. C.C.Bhalja, ASSTT. Government Pleader for the Respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 13/08/98

ORAL JUDGEMENT

By means of this petition, the petitioner has sought for quashing the order of termination dated 23rd April, 1986 and for her reinstatement in service with continuity of service with full back wages. The petitioner was appointed as Junior clerk by an order dated 20th July,1984 on temporary and ad hoc basis in the pay scale of Rs.260-400 with permissible allowances on 29 days on ad hoc basis with effect from 20th July, 1984.

It was also made clear that two conditions that her appointment was made on 29 days employment basis and secondly, she could be terminated without any notice on availability of candidates from the Collector's office in central recruitment scheme. She continued in service by 19 various orders as mentioned in Annexure "C" till her termination by the order dated 23rd April, 1986. The petitioner moved an application dated 5.2.1986 before the respondent no. 2 to grant her maternity leave for two months without pay. The respondent passed the following order dated 23.4.86 terminating her services.

"With reference to the above subject, the appointment of Deepikaben R Parmar is made who applied for 2 month's leave without pay from 6.2.86 to 31.3.86 but her present appointment as Clerk-cum Typist is on 29 days basis, she is not entitled for the leave and therefore, no question arises to sanction her leave. Her services are terminated with effect from 5.2.86 after office hours."

2. The learned counsel for the petitioner submitted that the petitioner's services were terminated only on the ground that she requested for maternity leave without pay. In this respect, in the affidavit-in-reply it is stated that in her absence, it was not possible to run office which is dealing with public at large and in her place, another person was appointed on the same basis of 29 days. The learned Assistant Government Pleader for the respondents submitted that the appointment of the petitioner was made purely on temporary and ad hoc basis for a period of 29 days. It was a stop-gap arrangement as regular appointments have to be made under centralised recruitment scheme. As the petitioner was not entitled for any leave, the respondents were justified in rejecting the application of the petitioner and passing the order of termination.

3. The learned counsel for the petitioner submitted that the appointment made for 29 days has been condemned by the Supreme Court in various cases. It is nothing but exploitation of the public at large by the State Authorities. For this purpose, he relied upon the judgment in the case of Ratanlal vs. State of Haryana and others,reported in 1985 (4) SCC, 43. wherein teachers who were appointed on ad hoc basis, it is held as under :

"The number of teachers in the State of Haryana who are thus appointed on such ad hoc basis is

very large indeed. If the teachers had been appointed regularly, they would have been entitled to the benefits of summer vacation alongwith the salary and allowances payable in respect of that period and to all other privileges such as casual leave, medical leave, maternity leave etc. available to all the Government servants. These benefits are denied to these ad hoc teachers unreasonably on account of this prenicious system of appointment adopted by the State Government. These ad hoc terachers are unnecessarily subjected to an arbitrary hiring and firing policy. These teachers who constitute the bulk of educated unemployed are compelled to accept these jobs on an ad hoc basis with miserable conditions of service. The Government appears to be exploiting this situation. This is not a sound personnel policy. It is bound to have serious repercussions on the educational institutions and the children studying there. The policy of ad hocism followed by the State Government for a long period has led to the breach of Article 14 and Article 16 of the Constitution. Such a situation cannot be permitted to last any longer."

4. The learned counsel for the petitioner further relied on the decision in the case of Karnataka State Private College Stop-gap Lecturers Association vs. State of Karnataka and others, reported in 1992(2) SCC,29, the Supreme Court while deprecating the direction given by the Government to break services for a day or two andpaying fixed salary to temporary employees,condemned the practice of management of not making regular selection utmost within six months of occurrence of vacancy must also be deprecated. The policy was challenged in other proceeding in the Supreme Court and following directions were issued by the Supreme Court:

(1) Provision in clause 5 of one day's break in service is struck down as ultra vires.
(2) Orders for payment of fixed salary to temporary teachers is declared invalid. But it shall operate prospectively. A teacher appointed temporarily shall be paid the salary that is admissible to any teacher appointed regularly.
(3) Any teacher appointed temporarily shall be continued till the purpose for which he has been

appointed exhausts of if it is in waiting of regular selection then till such selection is made.

(4) Managements shall take steps, whenever necessary, to fill up permanent vacancies in accordance with rules. Delay in filing up the vacancies shall not entitle the management or Director to terminate the services of temporary teachers except for adequate reasons. But it shall entitle the government to take such steps including supersession of management of stopping grant-in-aid if permitted under law to complete the institutions to comply with the rules.

5. The learned counsel for the petitioner also relied on the case of State of Haryana and others vs.Piarasing reported in 1992(4) SCC,118 to show that an ad hoc or temporary employee should not be replaced by any other ad hoc or temporary employee. He must be replaced only by a regular selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

6. The learned counsel for the petitioner also relied upon the decision of the learned Single Judge in the case of Ghanshyam Pandya vs. State of Gujarat and others reported in 1985 GLH (UJ), 51 wherein the petitioner of that case was given 42 appointment orders only for 29 days thinking that he would not acquire any right over post to which he was appointed. The action of the respondents in not giving appointment orders in the manner they had done appeared to be arbitrary and the petitioner was considered to be in continuous service from 1980 to 1984. He had in any case acquired a status of a temporary Government servant. His services could not have been terminated by an oral order. The action of terminating his service by an oral order was also arbitrary. Hence, the action of the authorities was violative of Articles 14 and 16 of the Constitution of India.

7. The submission of the learned counsel for the petitioner is that under Rule 771A of the Bombay Civil Service Rules, 1959 which says that the authority competent to sanction leave may grant to a female Government servant not in permanent employment maternity leave for a period which may extend up to the end of six weeks from the date of confinement, whichever is earlier, subject to the conditions below:

(1) The concession of maternity leave will be

admissible only to those temporary female Government servants who have put in at least one year of continuous service.

(2) The leave salary admissible during the period of maternity leave should be regulated as follows:

(a) In the case of those who have put in two or more years' continuous service, the leave salary admissible will be as laid down in 14(1) of the Revised Leave Rules, 1935; and

(b) In the case of those who have put in continuous service of not less than one year but less than two years, the leave salary admissible will be as laid down in rule 14(2) of the Revised Leave Rules, 1935. Such is not debited to the leave account:

8. On the other hand, learned AGP contended that it was a stop-gap arrangement by the department concerned. Persons can be appointed temporarily for such period as department thinks fit. In the present case, the petitioner was appointed purely on temporary basis on 29 days basis as she was not entitled for any leave, hence her services were terminated. The impunged order is perfectly justified. He further contended that the appointment of the petitioner was not made in accordance with any statutory provisions. Hence, she could not be regularised. He relied on the decision in the case of Inspector General of Registration, UP vs. Advesh Kumar, reported in 1996(9) SCC, 217 wherein the respondents were appointed as daily wagers typists not against a regular post and they were held by the Supreme Court as casual labourers and they were not entitled to be regularised. The facts and circumstances of that case are entirely different and not applicable to the facts of the present case. Hence, the case law cited by the learned AGP are not applicable to the facts of the present case. He also relied on a decision in the case of Bhagwatiprasad vs. Delhi State Mineral Development Corporation reported in 1990(1) SCC, 361 wherein the Supreme Court has held that once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications. Three year's experience ignoring artificial break in service was considered to be sufficient for confirmation. In the present case, the petitioner had not worked for more than three years and hence, she is not entitled for regularisation of her services. The case relied on by the learned AGP is not applicable to the instasnt case inasmuch as in the present petition, the petitioner has

not claimed for regularisation but she has sought for quashing of termination order on the ground of maternity leave requested for reinstatement in service with continuity of service.

9. He also relied on a decision of the learned Single Judge of this Court in the case of Patel Evelin Ramchhodbhai vs. The Gujarat Ayurved University, reported in 1987 (2) GLH, 461, wherein the petitioner of that case was appointed in the hospital of Gujarat Ayurved University as Midwife on temporary basis. She was found fit by the selection committee and though she was above prescribed age limit, she was not entitled to acquire right to be appointed merely because she was appointed on temporary basis. As rules for appointment by following procedure provide appointments to be made by following the Rules. The appointment of the petitioner of that case was not made according to Rules. It is true that from the version of the parties, it appears that the petitioner was not appointed after following the procedure provided by any rule. Hence, she cannot claim for regularisation on that post.

10. I have carefully considered the submissions made on behalf of the respondents and have also perused the relevant papers. In the present case, the Collector, Valsad required the District Employment Officer to send some persons for appointment on the vacant posts of clerk cum typist by a letter dated 23rd July 1984. The petitioner was appointed on temporary post (ad hoc basis) as junior clerk on the vacant post of person named B M Prajapati, Junior Clerk in the pay scale of Rs. 260-400 with permissible allowances on 29 days ad hoc basis with effect from 20.7.1984. Her appointment was made subject to two conditions that her appointment would be on 29 days basis and she can be terminated without any notice on availability of candidates from the Collector office under Central Recruitment Scheme. On the basis of that letter, she was given 19 appointment letters for 29 days from 19.7.84 to 17.1.86. The petitioner intended to go on maternity leave with effect from 6.2.198 to 31.3.86 for two months and applied for grant of leave without pay. The employment officer by his lorder dated 23rd April, 1986 terminated the services of the petitioner with effect from 5.2.1986 as the appointment as clerk cum typist was of 29 days basis, she was not entitled for leave and hence, the question to sanction her leave does not arise.

11. From the papers on record, it appears that regular selection of clerk cum typist could not be

made in accordance with rules. Hence, stop-gap arrangement was made by appointing persons temporarily till regular selection of the persons concerned. The order of appointment on temporary basis of 29 days employment has been depricated by the Supreme Court. In light of the Rule of Law laid down by the Supreme Court as stated above,the Government or any department therein is not permitted to make any appointment temporarily for 29 days basis employment by making artificial break. It is true that when regulare employees are not available due to any reason, the authorities concerned may appoint temporarily till the availability of regularly selected persons. So far as maternity leave is concerned, whenever any lady employee is appointed either on regular selection appointment or ad hoc basis or temporary basis and applies for maternity leave, under the Rules, she cannot be denied such right on the ground that the appointment was made for 29 days or any other ground. Now, once any lady is appointed, it is to be anticipated by the department that whenever maternity leave is required, will have to be granted to her. There is no exception for this rule and she cannot be denied maternity leave on any ground. Where regular selection

is not made for a long term and temporary appointment continues, at least the Government or concerned department should make an attempt to absorb them on regular posts unless they are found disqualified and ineligible for the post in question ignoring age bar.

12. In the above facts and circumstances, the termination of the petitioner is held to be arbitrary, illegal and unsustainable in the eye of law As a result, the petitioner is entitled to be reinstated in service. However, the learned counsel for the petitioner pointed out from the decision dated 15.11.1988 of the Supreme Court in the case of Daulatbhai and others vs. State of Gujarat and others passed in SLP no.12194 and 12200 of 1988 wherein the petitioners were directed to appear before the Selection Committee in regular selection ignoring the age bar and if petitioner claimed to be qualified for the post of clerk cum typist. Hence, whenever regular selection is made, the department concerned shall permit the petitioner to appear in the regular selection examination or test ignoring the age bar and till then the services of the petitioner shall not be terminated.

13. So far as back wages are concerned, she was not appointed by regular selection process and her appointment was temporary in the stop-gap arrangement.

Her claim for back wages therefore cannot be allowed.

14. Accordingly, the petition is allowed. The impugned order of termination dated 23.4.1986 is quashed and set aside and the respondent no. 2 District Employment Officer is directed to forthwith reinstate the petitioner on the post of clerk cum typist till regularly selected persons are available. The petitioner is qualified for the post of clerk cum typist and the department concerned is therefore,directed to permit her to appear in regular selection test whenever it takes place and she will not be terminated till regular selection is made. The respondent State of Gujarat and all its departments are hereby directed not to make any appointments temporarily for 29 days basis employment by making artificial breaks. It is further directed that whenever any lady is temporarily employed on ad hoc basis and requires maternity leave, she must be granted maternity leave. Rule is made absolute to the aforesaid extent with no order as to costs.

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